STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2000
v	No. 220404 Kent Circuit Court
MORRIS LAMONT ROBINSON, Defendant-Appellant.	LC No. 98-009696-FH

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possessing more than fifty grams but less than 225 grams of a mixture containing cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and of maintaining a dwelling that was used for keeping or selling cocaine, MCL 333.7405(1)(d); MSA 14.15(7405)(1)(d). He was sentenced to concurrent prison terms of ten to twenty years for the possession conviction and sixty days for maintaining a drug house. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred when it instructed the jury on the charge of possession with intent to deliver more than fifty grams of cocaine because he was not charged with that particular crime. Because defendant did not object to the challenged instruction at trial, we review this issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." . . . To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain,

> forfeited error resulted in the conviction of an actually innocent defendant or when an error "`seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id.* (citations omitted).]

Under the circumstances, it is not necessary to determine whether the charge was inappropriately submitted to the jury because, even if there was error, it was rendered harmless when the jury acquitted defendant of the unwarranted charge. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because any error was cured, defendant cannot demonstrate that he was prejudiced. Therefore, reversal is not warranted.

II

Defendant next argues that he was improperly denied the defense of duress when the trial court instructed the jury that it could not consider duress as a defense in this case.

In *People v Lemons*, 454 Mich 234, 245-247; 562 NW2d 447 (1997), the Court stated:

> Duress is a common-law affirmative defense. It is applicable in situations where the crime committed avoids a greater harm. The reasons underlying its existence are easy to discern:
>
> "The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person."
>
> In order to properly raise the defense, the defendant has the burden of producing "some evidence from which the jury can conclude that the essential elements of duress are present." In *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975), we held that a defendant successfully carries the burden of production where the defendant introduces some evidence from which the jury could conclude the following:
>
> "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm."

Additionally, in *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920), we acknowledged that the threatening conduct or act of compulsion must be "present,

> imminent, and impending[, that] [a] threat of further injury is not enough," and that the threat "must have arisen without the negligence or fault of the person who insists upon it as a defense. [Citation omitted.]

In *Lemons, supra* at 249-250, the Court found that the defendant had not offered sufficient evidence to support an instruction on duress. Specifically, the Court indicated that the defendant's testimony "offered nothing with regard to the *immediacy of any specific threat* as it related to any specific [criminal] act . . . ." *Id.* (emphasis added).

Shortly after *Lemons* was decided, this Court stated:

> The defense of duress is successfully raised where a defendant presents evidence from which a jury could conclude: (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, (3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act, and (4) the defendant committed the act to avoid the threatened harm. The defendant's actions must have been necessitated by conduct that would cause a reasonable person to fear death or serious bodily harm. Furthermore, the duress "must have arisen without the negligence or fault of the person who insists upon it as a defense." [*People v Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997) (citations omitted).]

In *People v Ramsdell*, 230 Mich App 386, 400-401; 585 NW2d 1 (1998), this Court stated that duress is not available as a defense for all crimes, but rather, it is an affirmative defense that is available only in situations "where the crime avoids a greater harm." This Court reaffirmed that mere threats of future injury are insufficient to support a defense of duress. *Id.* at 401. "Rather the threatened danger must be present, imminent, and impending." *Id.* In *Ramsdell*, after hearing testimony outside of the jury's presence to determine if the defense could be advanced, the trial court found that it could not be established. *Id.* This Court agreed:

> Defendant's offer of proof outside the jury's presence involved only a threat of future harm by Williams if defendant did not take possession of the package that contained the marijuana. Indeed, defendant indicated that he proceeded toward the "chow hall" with the package after Williams gave it to him without any threat of imminent harm. Even if the defense of duress is available to a charge of prisoner in possession of contraband, the trial court precluded defendant from placing this issue before the jury because defendant did not establish a prima facie defense of duress.

In this case, defendant not only failed to present evidence of a prima facie defense of duress but, as the trial court correctly noted, the defense was not available because the alleged duress resulted from defendant's own illegal conduct in purchasing drugs. With regard to the prima facie case, defendant testified to numerous events during direct examination. Defendant testified that he owed a debt to a drug dealer named R.J. and that R.J. never forgot the debt even though he did not actively seek

defendant out to recover payment. More than a year later, defendant accidentally met R.J., who was a very large man, in a bar. They discussed the indebtedness. R.J. was with three other guys at the time and defendant speculated that they probably protected R.J. or did his "dirty work." Defendant told R.J. that he did not have cash to pay the debt. Therefore, they reached an alternate solution to clear the debt. R.J. was to use defendant's house for two months. Defendant was aware that R.J. would use his house to further the drug trade. Defendant testified that he told R.J. that "whatever he does there, make sure that I'm not there, nor my girlfriend is there." Defendant then gave R.J. a key. On cross-examination, defendant first indicated that he helped R.J. in order to discharge the alleged debt. Later, however, defendant testified for the very first time that R.J. threatened him into making the agreement. R.J. was either going to use defendant's apartment as payment for the debt or he was "going to take it [the debt] out on" defendant. Defendant testified that he had no idea what R.J. had in mind but thought R.J. "could even possibly kill me." Defendant "felt" that if he did not agree to assist R.J., he would have been severely injured or killed.

The above testimony, if believed, does not support a jury determination that there was a present, imminent, and impending threat or that defendant acted under that threat. There was also no testimony about a particular or specific threat. Defendant simply testified about what he "felt" and thought might happen if he did not cooperate. A jury could not have concluded that duress was operating upon the mind of defendant when he gave R.J. a key and agreed to allow R.J. to maintain a drug house at defendant's apartment. To the contrary, defendant indicated that he placed conditions on R.J.'s use of the property by telling R.J. not to conduct business there if he or Nelson were home. Moreover, defendant clearly was not under any duress when R.J. entered defendant's house to conduct illegal business. Defendant testified that he was not home at the times that R.J. did his business. A duress defense was not available to defendant.

After defendant improperly injected the duress defense into the case, the trial court attempted to rectify the situation. It did so by instructing the jury that duress was not a defense under the circumstances. The trial court's instruction was an accurate statement of the law and was not erroneous.

> The trial court has discretion to give additional instructions not covered by the standard jury instructions as long as they are applicable and accurately state the law and are concise, understandable, conversational, unslanted, and nonargumentative. [*Mull v Equitable Live Assurance Society of US*, 196 Mich App 411, 422; 493 NW2d 447 (1992).]

The instruction at issue adequately protected defendant's rights and fully and fairly apprised the jury of the law. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997).

III

Defendant next argues that he was convicted of a nonexistent crime and that the trial court improperly sentenced him to a crime different than that for which he was convicted. These arguments are patently disingenuous. Defendant was charged with possession of more than fifty but less than 225

grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). At trial, there was no dispute that the amount of cocaine at issue was approximately 180 grams. The verdict form, which was approved by defendant, stated three options: "Guilty of possession with intent to deliver more than 50 grams of cocaine;" "Guilty of possessing more than 50 grams of cocaine;" or "Not guilty." The jury chose "Guilty of possessing more than 50 grams of cocaine." The judgment of sentence clearly indicates that the trial court sentenced defendant pursuant to MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). Based on the record, there is no dispute that defendant was convicted and sentenced for possessing more than fifty but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). Defendant makes the entirely meritless argument that his conviction was invalid because "possession of more than 50 grams of cocaine" is a nonexistent crime. Defendant apparently relies on the fact that the trial court and parties frequently referred to the crime as "possessing more than 50 grams" instead of "possessing more than 50 *but less than 225* grams" and the fact that the jury convicted him of "possessing more than 50 grams of cocaine" as opposed to "possessing more than 50 *but less than 225* grams of cocaine." Defendant's argument exalts form over substance.

In *People v Rand*, 397 Mich 638, 641; 247 NW2d 508 (1976), modified 399 Mich 1040 (1977), the form of the verdict included an option for "assault to do great bodily harm less than the crime of murder." The words "with intent" were accidentally omitted. *Id.* The trial court sentenced defendant for "assault *with intent* to do great bodily harm less than the crime of murder." *Id.* at 642. On appeal, the Court found that there was no error requiring reversal because the verdict, as adduced by reference to the record, clearly convicted defendant of assault *with intent* to do great bodily harm less than the crime of murder. *Id.* at 643-645. "To find otherwise would, quite literally, exalt the form over the substance." *Id.* at 645. In reaching its conclusion, the Court ruled:

> Defendant, however, would preclude any interpretation of the jury's verdict which does not contain a reference to each element of the offense upon which conviction lies, despite the fact that examination of the four corners of the record may reveal beyond peradventure the jury's intention. We cannot agree. . . .
>
> . . . . The written form of the verdict should not be exalted over the substantive intent of the jury. We hold, therefore, that a jury verdict is not void for uncertainty if the jury's intent can be clearly deduced by reference to the pleadings, the court's charge, and the entire record. This standard of "clear deducibility" adequately protects the defendant's right to trial by jury while it avoids artificiality in the construction of the jury verdict. [*Id.* at 643.]

In this case it can be deduced from the record that defendant was convicted of a crime that does exist and that he was sentenced for the crime of which he was convicted, that being MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii).

IV

Defendant next argues that the trial court committed error requiring reversal when it responded to one of the jury's questions. The jury, after deliberating for only two hours, asked the court what would happen if it could not reach a verdict on Count I. The trial court instructed the jury that it had to reach a verdict on both counts or the entire case would be submitted to another jury at another time. The trial court also gave the jury several options with regard to continuing their deliberations. Defendant claims that the trial court's statement with regard to the failure to reach a verdict on both counts was erroneous and that the instructions on deliberation were coercive and forced the jury to reach a verdict.

Defendant's arguments are not subject to review because they were waived by defense counsel. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). In *Carter*, the Court indicated that where counsel expressly waives an error, which does not involve a basic right, there is no "error" that can be reviewed. *Id.* In this case, after the trial court gave the challenged instruction, both counsel for the defense and the prosecution affirmatively indicated that they had no objection to it. The instruction did not pertain to a basic or controlling issue in the case and did not cover any issue that would require the "fully informed and publicly acknowledged consent" of defendant in order for effective waiver. Trial counsels' decisions with regard to certain jury instructions are often matters of trial strategy. See *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999); *People v Coddington*, 188 Mich App 584, 608; 470 NW2d 478 (1991). The decision to expressly approve of the trial court's erroneous statement to the jury could have been a matter of trial strategy. Defense counsel may have believed that it was strategically better to have both counts decided together. Moreover, there was no reason to object to the instruction regarding deliberation that was given to the jury. A supplemental instruction to a deadlocked jury is not improper if it has no coercive effect. *People v Daniels*, 142 Mich App 96, 97; 368 NW2d 904 (1985). Coercive effect is found where the court requires or threatens to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals, or where the jurors are threatened to give up their honest convictions and agree with the majority. *Id.* at 97-98 (citation omitted). In this case, the jury instruction was explicitly noncoercive. Because the issues with regard to the supplemental instructions were issues capable of being waived by counsel and because they were in fact waived, there is no error for this Court to review.

V

Defendant next argues that the prosecutor improperly elicited testimony from defendant that he exercised his right to remain silent. We disagree. A prosecutor may use a defendant's silence to impeach a claim that defendant was not given an opportunity to explain his exculpatory version of events to the police. *People v Crump*, 216 Mich App 210, 214-215; 549 NW2d 36 (1996); *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993).

In this case, on direct examination, defendant indicated that he did not tell his story to the police because he did not think they would believe him and that he probably would have been locked up, would not have had a way to defend himself properly, and would not have had a chance to have a jury hear his story. Defendant also testified, however, that he eventually hired a lawyer and turned himself in to the police station. There was no testimony that he told his side of the story to the police after he turned himself in with the assistance of counsel. On cross-examination, the prosecutor attempted to

elicit that defendant did not tell his story until he took the witness stand at trial. Defendant gave a nonresponsive answer to the prosecutor's question and indicated that he never told the police his story because the police "never asked." Following a bench conference, the prosecution asked defendant if the police failed to question him because he had exercised his right to remain silent. Defendant answered affirmatively. Under the circumstances, where defendant inferred that he did not tell his story to police because he would have been treated unfairly and where defendant indicated that he was never asked to tell his story, the prosecution was entitled to elicit that defendant had exercised his right to remain silent. The jury was entitled to know that defendant was given an opportunity to tell his side of the story and refused to do so. *Crump, supra*. The prosecution did not use defendant's silence to rebut a claim of innocence, but to rebut the inference that defendant did not have an opportunity to present his exculpatory story before trial.

VI

Defendant next argues that the search warrant should have been challenged, that evidence seized pursuant to the search warrant should have been suppressed, and that his counsel was ineffective for failing to move to suppress.[1] The issue of the validity of the search warrant and the seizure of evidence pursuant to it is not preserved. We therefore review the issue for plain error. *Carines, supra.*

When the uniformed police officers, who were lawfully on defendant's premises, saw evidence of illegal drug activity in plain view, they had the right to seize that evidence. *People v Champion,* 452 Mich 92, 101; 549 NW2d 849 (1996).

> The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent. [*Id.*]

Once the officers had the incriminating evidence under their control, they were entitled to have other officers view it and confirm that the substance that was found in plain view on a plate with a razor blade and on an electronic scale was indeed cocaine. There was nothing improper with the officers' conduct. Moreover, there is no authority to support defendant's claim that officers may not rely on properly seized evidence to secure a search warrant to look for more evidence. Nothing in the record supports defendant's claim that the police conducted any unlawful search or seizure at defendant's home. The record only reflects that uniformed officers saw, in plain view, items related to criminal activity, that the officers took control over those items, and that the items were then used to secure a search warrant for the premises. Only after the warrant was obtained did the drug dog and vice officers search the premises for additional items. It was then that the cocaine, which resulted in the charges, was found. Because the record does not support a conclusion that a motion to suppress was warranted,

[1] We note that in his brief on appeal, defendant makes representations as to what the affidavit in support of the search warrant stated. Neither the affidavit nor the search warrant itself are part of the record. It is impermissible to expand the record on appeal. Moreover, we note that defendant fails to provide the search warrant or affidavit for this Court's review and never moved to expand the record to include them. Thus, we will not consider defendant's representations about the contents of the affidavit.

defendant's argument that his counsel was ineffective for not moving to suppress has no merit. Defense counsel was not required to make a meritless motion. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998).

VII

Defendant next argues that the trial court improperly defined "reasonable doubt" to the jury and, in doing so, materially lowered the prosecution's burden of proof. We disagree that this unpreserved error requires reversal.

Where an instruction adequately conveys the concept of reasonable doubt, the instruction is proper. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997).

> To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted reasonable doubt. [*People v Hubbard (After Remand)*. 217 Mich App 459, 487; 552 NW2d 493 (1996).]

The instruction must convey that reasonable doubt is "an honest belief based on reason." *Id.*

In this case, contrary to defendant's argument, the trial court did not simply equate reasonable doubt with "firm conviction" or "real possibility." Rather, the court instructed that guilt had to be demonstrated beyond a reasonable doubt and that it was not sufficient to establish a possibility or probability of guilt. Rather, the jury had to be "firmly convinced" of guilt based on the evidence and conclusions drawn from it. In addition, the trial court warned that reasonable doubt did not mean beyond all possible doubt or with absolute certainty. The instruction at issue adequately conveyed the concept of reasonable doubt, i.e. that there had to be an honest doubt (firm conviction) based on reason (the evidence and conclusions drawn from it). Because the instruction, when read as a whole, adequately conveyed the concept of reasonable doubt, we find no plain error requiring reversal.

VIII

Defendant next argues that the trial court abused its discretion when it admitted evidence that defendant's fingerprint was found on a plate containing cocaine residue that was seized by the police. There was no plain error in the admission of the evidence.

In general, all relevant evidence is admissible. MRE 402.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [MRE 401.]

There is no doubt that the fingerprint evidence was relevant. There was a question at trial with regard to the possession of cocaine found at defendant's home. Defendant claimed that he no longer used cocaine, that he was not involved with any of the cocaine that was at his house, and that he did not

handle any of the cocaine found in the house. The evidence of defendant's fingerprint on a plate with cocaine residue tended to make the existence of a fact of consequence, who possessed the cocaine, more probable than it would have been without the evidence. It also tended to discredit defendant's claims.

In addition, the relevant fingerprint evidence was not unfairly prejudicial. MRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Unfair prejudice has been defined as:

> In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. [*People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).]

The fingerprint evidence at issue did not have any undue tendency to cause the jury to decide the case on an improper basis.

The fact that the fingerprint could have been made at any time did not effect its admissibility. The challenges to the fingerprint evidence were relevant only to the weight of the evidence. See e.g., *People v Ketzner*, 47 Mich App 75, 94; 209 NW2d 272 (1973). Arguments regarding the weight of evidence do not effect admissibility but are properly made to the trier of fact. See *People v Campbell*, 236 Mich App 490, 503-504; 601 NW2d 114 (1999). Because the fingerprint evidence was relevant and was not unfairly prejudicial, its admission was not a plain error.

IX

Defendant next argues that the trial court's instruction on aiding and abetting was improper because it was woefully inadequate and was not warranted based on the evidence produced at trial.

If sufficient evidence is presented from which a rational trier of fact could find defendant guilty as an aider or abettor, it is proper to instruct on that theory. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999). To support the giving of the instruction there must be evidence that "(1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998), citing *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). In *Head*, the defendant, not the prosecutor, raised the theory that warranted an instruction on aiding and abetting. This Court stated:

> Defendant's theory of the case was that the drugs belonged to his girlfriend or another party. The prosecutor requested an instruction on the theory that, even if the drugs and paraphernalia belonged to someone else, defendant assisted that person by providing a storage place for them. We find no error in the judge's decision to instruct the jury on the issue [of aiding and abetting]. The evidence presented at trial required the judge to give the aiding and abetting instruction. [*Id.*]

In this case, like in *Head, supra,* the evidence at trial supported an instruction on aiding and abetting. Defendant injected the issue of aiding and abetting when he tried to minimize his role with regard to the drugs and claimed that the drugs belonged to R.J. Once defendant injected the theory that he was not the principal, the prosecutor argued that aiding and abetting was an alternative theory under which to convict defendant. Because there was evidence, if believed, that more than one person was involved in the commission of the crime and that defendant's role may have been less than direct participation in the wrongdoing, the instruction on aiding and abetting was properly given. *Bartlett, supra; Head, supra*.

Defendant also states on appeal that the instruction on aiding and abetting was "woefully inadequate." Defendant does not explain his position or offer any authority to support his position in this regard. Thus, this issue is abandoned, *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995), and we will not review it, *People v Connor*, 209 Mich App 419, 430; 531 NW2d 734 (1995).

X

Finally, defendant argues that his counsel was ineffective with regard to each allegation of error raised on appeal. We disagree.

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard or reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, defense counsel is not required to make frivolous or meritless motions, *Darden, supra*, or objections, *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

In this case, defendant has not demonstrated that his counsel's performance was objectively unreasonable with regard to any of the alleged errors argued on appeal. Moreover, defendant has not demonstrated that the outcome of the proceedings would have been different if counsel had objected to any of the instructions, moved to suppress evidence, or acted with regard

to any of the other claimed errors, none of which had merit. Thus, defendant has not met his burden of demonstrating that he did not receive the effective assistance of counsel.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ Gary R. McDonald